

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Coffeen and Western Railroad Company,
Petitioner,

v.

Montgomery County, East Fork Township, Grisham Township,
Walshville Township, and State of Illinois Department of
Transportation,
Respondents.

Norfolk Southern Railway Company and Illinois Coal Association,
Intervenors.

Petition for an Order authorizing the construction of at-grade and
grade separated crossings in and around Coffeen, Illinois.

T04-0084

ORDER

BY THE COMMISSION:

On December 14, 2004, Coffeen and Western Railroad Company ("CWRC") filed a verified Petition with the Illinois Commerce Commission ("the Commission") in the above captioned matter seeking an Order authorizing the construction and maintenance of certain roadway-rail at-grade crossings and grade separated crossings at various locations in and around Coffeen, Illinois. Petitions for Leave to Intervene were filed by Norfolk Southern Railway Company ("NS" or "Norfolk Southern") and the Illinois Coal Association ("ICA"). A duly authorized Administrative Law Judge ("ALJ") of the Commission granted the Petitions for Leave to Intervene.

BACKGROUND

Petitioner, Coffeen and Western Railroad Company, essentially proposes to construct a "new railroad" approximately 13.5 miles in distance, from the Coffeen Power Plant to connect to two separate existing railroad tracks owned and operated by Burlington Northern Santa Fe Railway Company (now known as BNSF Railroad Company) ("BNSF"), and Union Pacific Railroad Company ("UPRR"). At present, the Coffeen Power Plant is serviced only via track owned and operated by Norfolk Southern Railway Company. Approval of this project would allow Petitioner to use its own railroad track to service the Coffeen Power Plant, thereby obviating the need to use the NS track

for that purpose. Petitioner seeks authorization from the Commission to construct approximately ten (10) new at-grade rail/roadway crossings as part of the overall project. The proposed project also includes construction of two (2) private at-grade crossings and a grade separated crossing. Petitioner proposes to bear the cost of the construction project, including the costs of track, grade crossings, and warning devices the Commission orders installed at each crossing. Petitioner also proposes to maintain all of the crossings at its expense. CWRC does not seek any Grade Crossing Protection Funds or other public funding for the project.

Petitioner is an Illinois corporation with its principal place of business in St. Louis, Missouri, and is authorized to transact business in the State of Illinois. CWRC is a wholly owned subsidiary of Ameren Corporation ("Ameren"), which is the parent of four Illinois public utilities: Central Illinois Public Services Company; Central Illinois Light Company; Union Electric Company; and Illinois Power Company. Ameren Corporation is also the parent of Ameren Energy Generating Company ("AEGC"), which owns and operates the coal-fired, 950-megawatt, Coffeen Power Plant in the vicinity of Coffeen, Illinois.

As indicated, Norfolk Southern is currently the sole transportation provider for the coal that is used to fire the plant. In the Petition, CWRC states that it is the desire of AEGC and Ameren to lower fuel costs for customers by maximizing fuel and transportation options at AEGC plants. This led to AEGC's decision to petition the Surface Transportation Board ("STB"), on behalf of the newly formed CWRC, for common carrier authority to construct and operate the proposed new 13.5 mile line of track, referenced in the record herein as "Route A." Route A would connect the Coffeen Power Plant to the UPRR track and to the BNSF track at separate connections near Walshville, Illinois. [In the proceedings before the STB, Case #STB FD No. 34435, AEGC proposed construction of two alternate rail lines "Route A" and a different "Route B." However, ultimately before the STB and in this Commission proceeding, AEGC and CWRC settled upon Route A as the only proposed new rail line at issue, effectively removing any alternative route from the issues at hand.]

In its Petition, CWRC avers that the proposed build-out is essential to ensure maximum fuel flexibility, while maintaining the economically competitive status of the Coffeen Power Plant. According to Petitioner, Route A will allow AEGC to use multiple transportation providers, which CWRC maintains will ensure affordable transportation of coal in the future without increasing coal truck traffic to and from the Coffeen Power Plant.

The proposed route would cross eleven (11) public and three (3) private roads, all located in Montgomery County, but only one of which is within the jurisdiction of Montgomery County. Rather, the various Townships and the State of Illinois Department of Transportation ("IDOT") have jurisdiction over the other proposed crossings, as follows:

East Fork Township	North 4 th Avenue (County Road ("CR") 400)
	Arrow Trail (CR 1375)
	Buckeye Trail (CR 1275)
IDOT	Illinois Rte. 127 (CR 1125)
Grisham Township	Pheasant Trail (CR 1025)
	Fox Hunt Trail (CR 900)
	Loew Avenue (CR 350)
	Old Brushy Road (CR 625)
	Elm Trail (CR 425)
Walshville Township	North 3 rd Avenue (Grade separated)
Montgomery County	Long Bridge Trail (County Hwy 10)

As indicated above, in addition to these eleven (11) new public crossings, Petitioner's project contemplates three new private crossings in Montgomery County.

RELEVANT PROCEDURAL HISTORY

The original Petition in this case was filed on December 14, 2004. Initially the Petition named only Montgomery County as Respondent. The aforementioned Petitions for Leave to Intervene were subsequently filed by NS and the ICA, and, following briefing and argument, were ultimately granted by the ALJ over the objections of Petitioner. In February 2005, Respondent Montgomery County filed a Response to the Petition stating that it had no objections to the Petition provided that the STB granted CWRC authority to construct and operate the proposed new railroad, and provided that the proposed at-grade crossings on school bus routes were protected by automatic flashing light signals ("AFLS") and gates, and the proposed crossing within its jurisdiction (Long Bridge Road/County Highway 10) was constructed with a concrete crossing surface.

Pursuant to notice given in accordance with the law and the rules and regulations of the Commission, a non-evidentiary hearing held on March 10, 2005. Petitioner appeared by counsel, as did Intervenor Norfolk Southern. Montgomery County appeared by County Engineer Amy McNeal. Intervenor Illinois Coal Association appeared *pro se*. Henry Humphries, Rail Safety Specialist, Transportation Bureau of the Commission appeared on behalf of Staff. At this March 10, 2005 hearing, the ALJ ruled that Grisham Township, East Fork Township, Walshville Township and IDOT were

necessary Parties, and granted Petitioner leave to file an Amended Petition to add these governmental bodies as Parties. The ALJ also ruled that the Townships would be allowed to participate without counsel, given the economic hardship they would incur were they ordered to retain counsel. CWRC filed its Amended Petition adding the necessary Parties on March 21, 2005.

During the preliminary stages of the case, Norfolk Southern sought to supplement the record with various filings in and from the Surface Transportation Board proceeding in which AERG sought railroad operating authority on behalf of the Petitioner CWRC here. Petitioner objected to the request and the ALJ reserved ruling on the issue, pending introduction of evidence and further argument as the case progressed. NS also questioned what was essentially the standing of CWRC to proceed with the Petition in this matter, arguing that it was not a "railroad" as defined in and required of petitioning common carrier by rail parties under the Illinois Commercial Transportation Law ("ICTL"). NS reasoned that (1) AERG is not a "railroad" within the meaning of the ICTL, so could not be a Petitioner; and (2) the Surface Transportation Board had not yet issued a final Order in that "licensing" case granting CWRC authority to operate as a common carrier by rail, or approving the project proposed by AERG, so CWRC was also not a "railroad" within the meaning of the ICTL. Essentially, NS contended that neither AERG nor CWRC was a proper Party Petitioner to bring the Petition in the Commission in the first instance. At the final argument held at the August 25, 2005 hearing, NS agreed with the ALJ that, if the Commission were to grant the relief requested by Coffeen and Western Railroad Company here, and enter an Order allowing CWRC to construct the proposed crossings, then CWRC, and *only* CWRC, would have the authority to construct, maintain and operate the new rail line and crossings. If the STB denied the Petition of CWRC in the proceeding before it, or granted the Petition to an entity other than CWRC and to the exclusion of CWRC, then whatever authority this Commission grants to CWRC in this case would be of no effect. Stated another way, should this Commission grant the Petition filed by CWRC in this case, and grant Petitioner CWRC authority to construct the proposed crossings, then CWRC, and *only* CWRC (*not* AERG or any other entity), could construct, maintain and operate the rail line/crossings. Simply stated, any authority granted by the Commission here will be granted to CWRC and only CWRC, as it is the sole petitioning Party in this docket.

Throughout the course of all of the subsequent hearings and proceedings in this matter, the Parties and the ALJ diligently monitored and continually updated the status of the proceedings before the Surface Transportation Board. Ultimately, in a decision dated February 17, 2006, with an effective date of March 26, 2006, the Surface Transportation Board approved the Petition of AERG, on behalf of itself and its subsidiary CWRC, to allow construction and operation of the approximately 13.5 miles of rail line, provided that the companies comply with certain environmental mitigation conditions which it imposed in the decision. By Ruling dated March 23, 2006, the ALJ granted Petitioner's Motion for Leave to File the STB's decision as a late-filed exhibit. This essentially leaves the issues of grade crossing construction and safety, and appropriate crossing warning devices to this Commission in this docket.

On August 14, 2006, a Proposed Order was filed and served upon the Parties. Staff filed a Brief on Exceptions to the Proposed Order, stating that Staff agreed with the Proposed Order. No other Party filed any Brief on Exceptions to the Proposed Order.

PETITIONER'S EVIDENCE

May 2, 2005 Evidentiary Hearing

Pursuant to notice given in accordance with the law and the rules and regulations of the Commission, the matter came on for the first evidentiary hearing before a duly authorized ALJ of the Commission at its Springfield offices on May 2, 2005. Appearances were entered by CWRC, Montgomery County, IDOT, NS, ICA, Walshville Township, Grisham Township and East Fork Township. Staff appeared by Rail Safety Specialist Humphries. Petitioner presented the testimony of Robert Neff, President of CWRC and Vice President of Ameren Energy Fuels and Services ("AFS"), and Glenn Hay, Vice President and Corporate Secretary for Design Nine, Inc., the railroad design and engineering firm retained by Petitioner for the project.

Neff testified that both CWRC and AFS are wholly owned subsidiaries of Ameren Corporation. He stated that, upon construction of the proposed rail line, CWRC would provide rail service to the Coffeen Power Plant, and AFS would arrange for transportation and delivery of coal over the rail line to the plant. Neff confirmed that NS is currently the only rail carrier providing rail service to the plant, and that the proposed new railroad build-out would provide the power plant with two additional alternative rail suppliers. According to Neff, the resulting increased competition would result in lower transportation costs for the plant and its customers by allowing the plant greater fuel flexibility to source additional mines and use alternative rail suppliers. Neff stated that coal is one of the largest expenses at the power plant and that increased transportation and fuel sources are necessary: (1) in order to keep the Coffeen Power Plant competitive in the future; and (2) in order to keep fuel costs low for Illinois consumers. Neff opined that building the new track and tying in to the UPRR and BNSF lines would assist in accomplishing these goals.

According to Neff, approximately 300 trains would use the new line every year. He estimated train traffic at six trains in and six trains out per week, with no more than one loaded train in and one empty train out each day. Neff offered that these train traffic estimates closely approximate the amount of train traffic that currently operates on the existing NS line. Neff testified that CWRC had retained the railroad design firm, Design Nine, to design the proposed Route A and to insure that the proposed public road crossings will be safe and in compliance with all applicable regulations. Neff confirmed that the Petitioner is willing to install and maintain, at its own costs, the safety devices recommended by Design Nine.

Neff also testified that the Grisham Township Highway Commissioner, Thomas Chappellear, had expressed concern that Route A would cross another road that Chappellear considered to be public. (This road does not have a name, but was referred to in hearings as the "Spaeth Road.") Neff testified that, upon hearing of

Chappelear's concerns, Petitioner took four steps to determine the status of the road. First, Petitioner hired a knowledgeable real estate consultant to examine the records of the Recorder of Deeds in Montgomery County; upon examination, the consultant could find no records of such road. Second, Petitioner hired an abstractor to examine the records of the Montgomery County Clerk, the County Recorder and the County Circuit Court; the abstractor could not find record of the road ever having been established, abandoned or vacated. The abstractor's report was entered into evidence. Next, Petitioner contacted IDOT and Montgomery County, who both said that they did not have a record of such road on their maps. IDOT wrote Petitioner a letter to that effect, which was entered into evidence. Last, Petitioner sent Ameren representatives to the property to inspect the location of the road; those representatives found a locked gate preventing public access, and found that the road was either poorly maintained or not maintained at all, such that in some areas, one could not tell if the road existed. Neff testified that based on all of the above, Petitioner had concluded the road was private, and not public. Regardless, Neff testified that Petitioner would install a timber at-grade crossing with crossbucks for the owner of the property at the purported Spaeth Road location. Neff testified that Petitioner would adopt additional safety measures at any of the public crossings if Design Nine were to recommend them.

Glenn T. Hay, Vice-President and Corporate Secretary for Design Nine, Inc., also testified on behalf of Petitioner. Hay testified that he has over 25 years of experience in railroad design and engineering, on behalf of several clients, including the State of Illinois. Hay testified that the new rail line was designed with the convenience of the public in mind, attempting to build the route along an existing public used corridor, *i.e.*, a corridor of utility transmission lines. In designing Route A, Design Nine also attempted to minimize the number of crossings and drainage structures, minimize visibility issues, cross any public roads as close to 90 degrees as possible, and maintain a "reasonable" grade. Hay testified that Route A was designed in accordance with the Illinois Administrative Code and with the American Railway Engineering and Maintenance of Way Association ("AREMA") recommendations.

Hay testified that, at all of the approximate sites of the above proposed crossings except Illinois Route 127, IDOT's most recent estimate of Average Daily Traffic (ADT) is less than 500 vehicles per day. At the proposed Illinois Route 127 crossing, the ADT estimate is 2,500 vehicles per day. Hay testified that, based on that estimate, the proposed Illinois Route 127 crossing would have flashing lights and gates with a concrete roadway surface. For all the other crossings, Hay testified that MUTCD ("Uniform Manual of Traffic Control Devices") crossbucks and four-board timber and asphalt surfaces would be used. Hay also testified that, based on conversations with the township commissioners and county engineer, Petitioner would be installing coated pipe rather than plain galvanized pipe that was originally planned. With respect to each of the proposed crossings, Hay testified that the crossing conformed with ICC regulations and AREMA recommendations and would accommodate drainage. With respect to the proposed marking and warning safety devices at each crossing, Hay testified that the devices conformed with the Uniform Manual of Traffic Control Devices. Pre-filed exhibits detailing the design plans of the crossings were entered into

evidence.

On cross-examination, Hay testified that he did not take into account school bus routes in designing the proposed crossings. On redirect, he testified that, after designing the proposed crossings, he looked at information regarding school bus traffic compiled by Petitioner through conversations with Hillsboro, Litchfield, Mt. Olive, and Bond County School Districts. An exhibit containing Petitioner's research on school bus information was entered into evidence. Hay testified that the information contained in the exhibit did not change his opinion regarding the appropriate safety measures at each crossing. Hay testified that, taking into account such information and low ADT counts, advance warning signs were appropriate safety measures to warn school buses. Hay also estimated that installation of standard crossbucks would cost approximately \$500, while construction of a flashing light and gates crossing could range from \$40,000 to \$250,000. Petitioner submitted into evidence detailed design and engineering drawings and schematics showing each crossing, crossing warning devices and other engineering information in support of the Petition. Petitioner rested its case-in-chief at the conclusion of this May 2, 2005 hearing.

May 17, 2005 Site Visit

Pursuant to suggestion of the ALJ, and agreement of all of the Parties and Intervenor, on May 17, 2005, the parties gathered in Hillsboro, Illinois, and participated in an off-the-record viewing of the proposed Route A. The Parties, Commission Staff, Design Nine engineer Hay, and the ALJ traveled the entire length of the proposed new rail line, and specifically made an exhaustive review and analysis of the location of each and every proposed crossing necessary for the build-out of the new rail line.

Respondents' and Intervenor's Case

June 9, 2005 Evidentiary Hearing

Pursuant to notice given in accordance with the law and the rules and regulations of the Commission, the matter came on for another evidentiary hearing before an ALJ of the Commission on June 9, 2005 at the Commission's offices in Springfield, Illinois. Appearances were entered by CWRC, Montgomery County, Walshville Township, Grisham Township, Staff, IDOT, and Intervenor NS and the ICA. Pursuant to request by the ALJ, Counsel for CWRC provided the Commission with an update on the Surface Transportation Board proceedings. Counsel stated that on May 25, 2005, the STB's Section of Environmental Analysis issued an Environmental Assessment of the proposed Route A, and that the comment period for the Environmental Assessment was scheduled to close on June 30, 2005. Following the comment period, the STB would then incorporate comments into the assessment, revise the assessment, and send the environmental assessment to the full Board. The full Board would then issue a decision in the case. Counsel felt that the anticipated time period for these actions to take place was approximately six months.

Amy McNeal, Montgomery County Engineer, then testified that she did not

understand why the railroad needed to be built, because there was already a railroad in place at the plant. McNeal also testified that while the County did not want any more rail crossings, it would accept the rail line if it is approved by the STB and meets safety requirements. McNeal expressed safety concerns with respect to school bus routes, and offered into evidence letters expressing similar concerns from the Montgomery County State's Attorney and Superintendent of the Hillsboro School District. These letters requested flashing lights and gates at all proposed crossings on Route A that are school bus routes. On cross-examination, McNeal testified that there are no traffic signals on any of the affected roads, and that many of the roads do not have stop signs. McNeal also testified that school bus traffic was within the normal use of a county or township road.

Thomas Chappelear, Grisham Township Highway Commissioner, testified that, in addition to routes that Petitioner had previously identified, Loew Avenue is also a school bus route. Chappelear testified that any road could become a school bus route at any time, depending upon residential population shifts and movements within the Township or County. Chappelear testified that Grisham Township has safety concerns about the Old Brushy Road and Fox Hunt Trail crossings, and regarding emergency vehicle services. Chappelear testified to budgetary concerns with respect to replacing advance warning signs in the future, and other various maintenance concerns, stating that his Township's budget is limited at best. Chappelear also expressed concerns about the smoothness of the timber and asphalt crossings. Chappelear testified that Grisham Township wants flashing lights and gates, and a concrete-material crossing, at Old Brushy Road, Fox Hunt Trail, Loew Avenue, and Elm Trail.

On cross-examination, Chappelear confirmed that any road could become a school bus route at some point in time, and that the only way for the ICC to be sure that all school bus routes had flashing lights and gates would be to have them installed at every crossing. Chappelear acknowledged that the ICC's regulations do not require flashing lights and gates at every crossing. Chappelear also acknowledged that there are presently no street lights and stop signs along the school bus routes in question. McNeal added that she, as Montgomery County Engineer, makes the decision whether to erect or install signs or lights, and that the reason why there are no signs and lights on these roads is "because a majority of the traffic is local traffic and they are aware to know when to stop." (Tr. at pp. 218-219.) McNeal considers train traffic different because "you are not going to know significantly when these people are going to come" (Tr. At p. 219), and because the impact of a train accident would be greater.

With respect to the Spaeth crossing, Chappelear testified that it is his belief that once a road is public, it stays public until it is vacated. Chappelear testified that he believes that the road is public because it is marked on a 1912 atlas map he purchased in an antique mall in Springfield, and because his 78-year-old father remembers traveling on it. Chappelear testified that he does not have any other documentation, but that he does not believe many of the township roads have been formally dedicated. Chappelear acknowledged that the road does not have a name and is gated from public use, and that the township does not maintain the road beyond the gate.

Dean DeVries testified on behalf of the Walshville Township. DeVries requested that the separated grade crossing at North 3rd Avenue be constructed with a minimum 18-foot height clearance, to allow for enough room for large farm equipment to pass underneath.

Phil Gonet, President of Intervenor Illinois Coal Association, offered into evidence the May 25, 2005, Environmental Assessment of the STB Docket. Gonet asked to recall Glenn Hay, Petitioner's retained engineering expert, as a witness, and asked Hay how much Route A will cost to construct. CWRC objected on grounds that such information is confidential and irrelevant. The ALJ ordered briefings on this issue.

Neil Flynn, Counsel for Intervenor NS, requested clarification from the ALJ as to the relationship between the ICC proceeding and the STB proceeding, and whether the issue before the Commission is to approve the construction of the proposed 13.5 mile line of track, or whether the Commission is only to determine what crossing protections will be necessary when and if the STB authorizes construction of the track. The ALJ ordered briefings on the scope of the Commission's jurisdiction in this matter. The ALJ also ordered Staff to provide its assessment of what the minimum safety requirements would be for the proposed crossings under the law and the rules and regulations of the Commission, and entered a briefing schedule on the various issues.

William Schroeder of 11204 North Sixth Avenue, Hillsboro, requested and was granted leave to make a statement on the record on his own behalf, as an Ameren stockholder and as a resident of Hillsboro, Montgomery County, Grisham Township, Illinois. Schroeder expressed concerns about environmental issues, the ability of emergency vehicles to use the crossings should a train occupy the new rail line, and the costs to build the new rail line and rail/roadway crossings.

Scope of Jurisdiction

Although NS raised the issue, CWRC was the only party to file a brief on the scope of jurisdiction issues. In its brief, CWRC argued that the scope of the Commission's jurisdiction in these proceedings is well-established and limited to establishing safety measures at the proposed crossings, according to Illinois and federal law, and principles of federal preemption. See, e.g. *Cleveland, C., C. & St. L. Ry. Co. v. Commerce Commission ex rel. J.K. Derling Coal Co., et al.*, 315 Ill. 461, 459 (1925) (recognizing that authority to approve construction of a new rail line is vested in the federal government, not the states). CWRC maintained that Congress limited the Commission's authority when it enacted the Interstate Commerce Commission Termination Act of 1995 ("Termination Act" or "Act"), citing several recent federal court opinions holding the state and local government authorities no longer have jurisdiction to grant or deny preconstruction approval of any proposed rail construction project, according to the Act's express preemption clause (49 U.S.C. § 1050(b)). See, e.g., *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 641 (2nd Cir. 2005) (finding Termination Act preempts state environmental law requiring discretionary preconstruction approval to build railroad transloading facility); *CSX Transp. Inc. v. Ga. Pub. Serv. Comm'n*, 944 F. Supp. 1573, 1581 (N.D.Ga. 1996) ("It is difficult to imagine a

broader statement of Congress' intent to preempt state regulatory authority over railroad operations."), *quoted by Wisc. Central Ltd. v. City of Marshfield*, 160 F. Supp. 2d 1009, 1013 (W.D. Wisc. 2000); also *quoted by City of Auburn v. U.S.*, 154 F.3d 1025, 1030 (9th Cir. 1998).

Nevertheless, the Administrative Law Judge rendered the opinion that the Commission has authority and jurisdiction to grant Petitioner CWRC's Petition/request that the Commission enter an Order authorizing Petitioner to construct the crossings over public roadways. While the federal government, and not the state, may have jurisdiction over construction of a new railroad line *per se*, it is the Illinois Commerce Commission which has jurisdiction to entertain and grant or deny a Petition seeking authorization to construct crossings over public roadways in the State, such as CWRC's Petition/request in the instant matter. Further, CWRC agrees that the Commission has the authority to order CWRC to install crossing safety equipment that is necessary to preserve and protect public safety (as is consistent with well established Illinois law, *see, e.g., Ill. Commerce Comm'n et al. v. N.Y. Centr. R.R. Co. et al.*, 398 Ill. 11, 16 (1947)), so long as the Commission does not issue an order with respect to rail crossing safety that would unreasonably burden interstate commerce, or that is incompatible with a law, regulation, or order of the United States Government. 49 U.S.C.S. § 20106.

In conclusion, the Illinois Commerce Commission has jurisdiction over the Parties and the subject matter of the Petition in this case.

Staff's Recommended Crossing Warning Devices

On June 10, 2005, Commission Staff, Henry Humphries, Rail Safety Specialist, filed Staff's Position Brief outlining the warning devices which should be installed at each of the proposed crossings, should the Commission grant the relief requested in CWRC's Petition. Staff's recommendations are based upon what Staff believes would be necessary in order to provide adequate warning to the public. Staff's recommended crossing warning devices for each proposed crossing is as follows:

<u>Location</u>	<u>Milepost</u>	<u>ADT</u>	<u>Proposed Protection</u>	<u>Staff Recommendation</u>
Brackett (private)	67+00	N/A	Crossbucks	Private crossing sign ⁶
CR 400 - N.4 th Ave.	115+37	225	Crossbucks	New MUTCD crossbucks with "Yield sign" ¹
CR 1375 - Arrow Trail	130+74	25	Crossbucks	New MUTCD crossbucks with

				"Yield sign" ¹
CR 1275 - Buckeye Trail		75	Crossbucks	New MUTCD crossbucks with "Yield sign"
ILL. 127/CR 1125	257+47	2500	AFLS/Gates	AFLS/Gates
CR 1025 - Pheasant Trail	334+96	25	Crossbucks	New MUTCD crossbucks with "Yield sign"
CR 900 - Fox Hunt Trail	366+88	200	Crossbucks	New MUTCD crossbucks with "Yield sign" ²
Laughlin Lane (Private)	401+65	N/A Grade Separated	Crossbucks	Private crossing sign ⁶
CR 650/10 - Long Bridge Trail	525+32	450	Crossbucks	New MUTCD crossbucks with "Yield sign" ³
CR 350 - Loew Avenue	529+75	450	Crossbucks	New MUTCD crossbucks with "Yield sign"
CR 625 - Old Brushy Road	541+46	100	Crossbucks	New MUTCD crossbucks with "Yield sign" ⁴
CR 300 – N. 3 rd Ave.	575+25.5	100 Grade Separated	N/A	
Weiss (Private)	581+25	N/A	Crossbucks	Private crossing sign ⁶
CR 425 - Elm Trail	529+90	<500	Crossbucks	New MUTCD crossbucks with "Yield sign" ⁵

[MUTCD – US DOT "Manual on Uniform Traffic Control Devices"]

¹ Crossing additionally should be crew flagged for each train movement, due to trains stopping on or near crossing potentially causing a stopping sight restriction.

² Crossing additionally should be crew flagged for each train movement, due to trains stopping on or near crossing potentially causing a stopping sight restriction.

³ Crossing additionally should be crew flagged for each train movement, due to stopping sight restriction caused by a building and curve in roadway to the south.

⁴ Crossing additionally should be crew flagged for each train movement, due to stopping sight restriction caused by a grade in the roadway and the proposed track being constructed in a cut section.

⁵ Crossing additionally should be crew flagged for each train movement, due to stopping

sight restriction caused by trees and brush on private property.

⁶ Private crossing standard (BNSF) attached for reference. Private crossing signs should be installed verses crossbucks to help distinguish from private and public.

As an alternate to the above recommendations, Staff submitted that Petitioner could install automatic flashing light signals and gates in lieu of crossbucks and crew flagging.

Staff further recommended that any Commission Order granting Petitioner authority to construct the crossings should be conditioned upon the Surface Transportation Board entering an Order granting AERG's and CWRC's Petition seeking approval to construct the proposed new 13.5 mile railroad line.

In response to Staff's recommendations, on July 8, 2005 Petitioner pre-filed rebuttal testimony of Glenn Hay, Design Nine, which was entered into evidence at the July 14, 2005 Evidentiary Hearing.

Evidentiary Rulings and Petitioner's Rebuttal Evidence

July 14, 2005 Evidentiary Hearing

Pursuant to notice given in accordance with the law and the rules and regulations of the Commission, the matter was reconvened before the ALJ in the Commission's Springfield office for the purpose of taking further evidence. Appearances were entered by CWRC, Montgomery County, Grisham Township, IDOT, Intervenor Norfolk Southern, and Commission Staff. Neither East Fork Township nor Walshville Township appeared. Intervenor Illinois Coal Association also did not participate in the July 14, 2005 hearing.

At the ALJ's request, Petitioner first updated the Parties as to the status of the proceedings pending before the Surface Transportation Board. CWRC's counsel stated that the public notice and comment period had expired, and the parties had filed responses to the comments with the STB. Counsel further advised that Petitioner was now simply waiting for the final decision from the STB. Counsel estimated that the decision might be forthcoming within the following three to six months, or between October 2005 and January 2006.

The ALJ then addressed the issue raised by the Illinois Coal Association at the June 9, 2005 hearing, namely: whether the ICA, or any other Party, would be allowed to examine Petitioner's witnesses on the issue of costs of construction of the new 13.5 mile rail line. The issue had been briefed and argued pursuant to leave previously granted by the ALJ at the June 9, 2005 hearing. The ALJ denied ICA's request and sustained CWRC's objections to the line of questioning concerning the costs of the project. The ALJ reasoned that that evidence was not relevant to this particular case pending before the Commission requesting authority to construct rail/roadway crossings, where Petitioner is not seeking any Grade Crossing Protection Fund monies or any other public funding for the project, and is funding the entire project itself. The ALJ did note that such evidence might be relevant in a proceeding in which, for

example, a utility were seeking a rate increase; however, it was not relevant here where a “new” railroad was seeking authority to construct a rail line at its own expense.

Petitioner CWRC then commenced its rebuttal case. Glenn Hay, Design Nine engineer, testified that Petitioner had agreed to each of Staff’s recommendations, with one exception. Rather than provide a flag crew, or alternatively flashing lights and gates, at the Fox Hunt Trail crossing (CR 900), Petitioner agreed to slow the train speed to 25 mph, per Hay’s recommendation, in order to improve the sight parallelogram at the crossing and address Staff’s visibility concerns. Hay prepared a diagram showing this improved sight parallelogram, which was entered into evidence. At Hay’s recommendation, Petitioner agreed to provide a flag crew at the North Fourth Avenue and Arrow Trail crossings. Petitioner also agreed to install MUTCD private crossing signs at each private crossing, including the Spaeth crossing.

Hay also testified that he considered the testimony of Grisham Township and Montgomery County regarding the school bus issues. Hay testified that Montgomery County’s and Grisham Township’s testimony regarding the presence of school bus routes on Buckeye Trail, Pheasant Trail, Long Bridge Trail, and Loew Avenue did not change his opinion that crossbucks and advance warning signs were adequate warning signals for those proposed crossings. Hay testified that school bus drivers are trained with respect to the hazards of rail crossings, and they are required to stop at every crossing, pursuant to Illinois law. Given the very low ADT counts (see Staff recommendation table above), visibility, speed limits, and school bus traffic, Hay testified that flashing lights and gates are not warranted at the Buckeye Trail, Pheasant Trail, Long Bridge Trail, and Loew Avenue crossings. Hay noted that his position was consistent with that of Staff.

Hay testified further that Petitioner agreed to Staff’s and local farm residents’ request for an 18-foot minimum clearance height at the North 3rd Avenue train bridge, which is the proposed grade separation to carry rail traffic over Lake Fork Creek and County Road 300 (N. 3rd Ave.) beneath the proposed rail-over-road bridge. Hay also entered into evidence a cost estimate totaling approximately \$121,000 to install flashing lights and gates at a recent Ameren Energy Resource Company at-grade rail construction project crossing on Illinois Route 9 near Canton, Illinois.

During Staff’s cross-examination, Hay testified that CWRC and AERG were in complete agreement with Staff’s recommendations. They proposed one modification to Staff’s recommendation at Fox Hunt Trail. Hay testified that Petitioner has addressed Staff’s visibility concerns at the crossing by agreeing to slow the train speed at the crossing to 25 mph. Hay also testified that he does not believe that growth of corn fields near the proposed crossings would cause adverse visibility issues.

Staff Rail Safety Specialist Humphries confirmed on the record that Commission Rail Safety Staff concurred with Hay’s testimony, as filed and submitted into evidence. Petitioner and Commission Staff ultimately agreed that the following crossing warning devices are appropriate and necessary at the proposed crossings to adequately warn, safeguard and protect the traveling public:

<u>Location</u>	<u>Milepost</u>	<u>ADT</u>	<u>Proposed Protection</u>	<u>Staff Recommendation</u>
Brackett (private)	67+00	N/A	Crossbucks	Private crossing sign
CR 400 - N.4 th Ave.	115+37	225	Crossbucks and flag crossing for each train movement	New MUTCD crossbucks with "Yield sign"
CR 1375 - Arrow Trail	130+74	25	Crossbucks and flag crossing for each train movement	New MUTCD crossbucks with "Yield sign"
CR 1275 - Buckeye Trail		75	Crossbucks	New MUTCD crossbucks with "Yield sign"
ILL. 127/CR 1125	257+47	2500	AFLS/Gates	AFLS/Gates
CR 1025 - Pheasant Trail	334+96	25	Crossbucks	New MUTCD crossbucks with "Yield sign"
CR 900 - Fox Hunt Trail	366+88	200	Crossbucks and maximum train speed of 25 mph in lieu of flagging	New MUTCD crossbucks with "Yield sign"
Laughlin Lane (Private)	401+65	N/A	Crossbucks	Private crossing sign
CR 650/10 - Long Bridge Trail	525+32	450	Crossbucks	New MUTCD crossbucks with "Yield sign"
CR 350 - Loew Avenue	529+75	450	Crossbucks	New MUTCD crossbucks with "Yield sign"
CR 625 - Old Brushy Road	541+46	100	AFLS and gates in lieu of crossbucks and flagging	New MUTCD crossbucks with "Yield sign"
CR 300 - N. 3 rd Ave.	575+25.5	100 Grade Separated	N/A	
Weiss	581+25	N/A	Crossbucks	Private crossing sign
CR 425 - Elm	529+90	<500	AFLS and gates	New MUTCD

Trail			in lieu of crossbucks and flagging	crossbucks with "Yield sign"
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At the conclusion of the July 14, 2006 hearing, Grisham Township entered a brief in response to Staff's Position Brief, stating that it disagreed with Staff's recommendations, and reiterating its request for automatic flashing light signals and gates at all of the Township crossing locations. Montgomery County also disagreed with Staff's recommendation for Long Bridge Trail, and reiterated its request for automatic flashing light signals and gates at that proposed crossing, or alternatively, at a minimum flashing light signals.

August 25, 2005 Hearing

Pursuant to notice given in accordance with the law and the rules and regulations of the Commission, the matter was reconvened for hearing before the ALJ at the offices of the Commission in Springfield, Illinois, on August 25, 2005. Appearances were entered by CWRC, Montgomery County, Grisham Township, IDOT, and Intervenor Norfolk Southern and Illinois Coal Association. Neither East Fork nor Walshville Townships appeared. All were advised that the Petition before the Surface Transportation Board for authority to build the new rail line remained pending. Closing arguments were given and, at the conclusion of the August 25, 2005 hearing, the record was marked "Heard and Taken."

Subsequent Surface Transportation Board Decision

As set forth in the Background in this Order, on February 17, 2006, the Surface Transportation Board issued its Order, effective March 26, 2006, granting the Petition pending before it, thereby granting CWRC common carrier authority to construct the 13.5 mile rail line build-out (subject only to completion of some environmental related remedial actions). The STB decision effectively rendered moot any argument that CWRC did not have authority or standing to file the Petition here or to request authority to construct the various crossings proposed in this docket.

Conclusion

Coffeen and Western Railroad Company has obtained common carrier authority from the United States Surface Transportation Board to construct and operate a new 13.5 mile rail line in and around the Coffeen Power Plant located in Montgomery County, Illinois. Coffeen and Western Railroad Company seeks authority from the Illinois Commerce Commission to construct, maintain and operate various railroad/roadway crossings necessary to the completion of that rail line in order to service the coal-operated Coffeen Power Plant, and connect with existing railroad lines owned and operated by Union Pacific Railroad Company and BNSF Railroad Company. The sole rail carrier currently providing service to the Coffeen Power Plant is Norfolk Southern Railway Company. Petitioner CWRC and Commission Staff have reached

agreement as to the safety warning devices necessary at each of the crossings in order to adequately protect the traveling public expected to use the crossings, while Respondents Montgomery County and Grisham Township disagree and request that automatic flashing light signals and gates be ordered installed at all of the proposed new crossings. The Commission has jurisdiction over all of the Parties and the subject matter of the Petition.

Findings and Orders

The Commission, having given due consideration to the entire record in this matter, finds that:

- (1) The Commission has jurisdiction over the parties and the subject matter of this proceeding;
- (2) the recitals of fact as set forth in the prefatory portion of this Order are supported by the record and are hereby adopted as findings of fact;
- (3) CWRC's proposed Route A will cross eleven public roads, all located in Montgomery County. Within Montgomery County's jurisdiction, Route A will cross Long Bridge Trail (County Highway 10). In the jurisdiction of East Fork Township, Route A will cross North 4th Avenue, Arrow Trail, and Buckeye Trail. In Grisham Township, Route A will cross Pheasant Trail, Fox Hunt Trail, Loew Avenue, Old Brushy Road, and Elm Trail. In Walshville Township, Route A will cross North 3rd Avenue at separated grade. Route A will also cross Illinois Route 127, which falls under IDOT's jurisdiction.
- (4) CWRC has consulted with Staff, IDOT, Montgomery County, and East Fork and Grisham Townships to design at-grade crossings that conform to existing road surfaces; Staff has inspected CWRC's design plans for the approach grade to the proposed crossings; CWRC's design plans for the approach grade to the proposed at-grade crossings conform with Commission rules and regulations.
- (5) Rail traffic on CWRC's proposed rail line is expected to consist of .86 loaded coal trains per day (on average, approximately 300 trains per year, six loaded and six empty trains per week); CWRC does not anticipate exceeding 365 loaded trains per year or an average of 1 loaded train per day (on average, seven loaded and seven empty trains per week); CWRC will set the speed limit for trains operating on the subject track, and agrees to reduce rail speed at the Fox Hunt Trail Crossing to 25 mph.
- (6) Staff has inspected CWRC's design plans for constructing at-grade crossings and warning signals; CWRC's design plan for the at-grade crossing and crossing warning signals conforms with Commissions rules and regulations, as modified in accordance with Staff's recommendations,

as follows:

- a. CWRC agrees to install MUTCD Crossbucks with Yield sign at the North Fourth Avenue and Arrow Trail Crossings, and flag the crossings for each Coffeen and Western train movement;
- b. CWRC agrees to install automatic flashing light signals and gates at the at-grade crossings at Old Brushy Road, Elm Trail, and Illinois Route 127;
- c. At each private crossing, CWRC will install private crossing signs, as suggested by Staff, with MUTCD crossbucks;
- d. At each of the remaining crossings (Buckeye Trail, Pheasant Trail, Long Bridge Trail, Loew Avenue, and Fox Hunt Trail) CWRC agrees to install MUTCD Crossbucks, as originally proposed, along with a Yield sign, as suggested by Staff;
- e. CWRC agrees to construct the proposed separated grade crossing at Third Avenue with an 18-foot clearance height, to allow for tall farm machinery to pass under the bridge.

IT IS THEREFORE ORDERED by the Illinois Commerce Commission that permission be, and is hereby, granted to Coffeen and Western Railroad Company to construct ten at-grade rail crossings and one separated grade crossing, as further described in Findings (3), (4), (5) and (6) herein, and thereafter maintain the crossings in accordance with 92 Ill. Admin. Code 1535.

IT IS FURTHER ORDERED that Petitioner, CWRC, is required and directed to proceed immediately in constructing and equipping said crossings, and shall complete the work within two (2) years from the date of this Order.

IT IS FURTHER ORDERED that CWRC shall construct the highway approaches to the track and crossing surfaces as set forth in Findings (4) and (6) herein and in accordance with 92 Ill. Admin. Code 1535.

IT IS FURTHER ORDERED that the Petitioner shall, for every new at-grade crossing, file with the Commission Form 3 of 92 Ill. Admin. Code 1535, showing details of the new crossing construction and automatic warning device installation herein required, and shall receive approval thereof by X-Resolution prior to commencing the work.

IT IS FURTHER ORDERED by the Illinois Commerce Commission that CWRC shall install and thereafter maintain the automatic warning devices, advance warning signs, and crossing surfaces as set forth in Finding (6) herein and in conformance with 92 Ill. Admin. Code 1535;

IT IS FURTHER ORDERED that the construction and maintenance costs of the project, including roadway approach work, surface installation, all appropriate signage, warning device and circuitry installation, as well as all future operating and maintenance costs shall be paid by CWRC.

IT IS FURTHER ORDERED that Petitioner shall, at six (6) month intervals from the date of this Commission Order, submit to the Director of Processing and Information, Transportation Bureau of the Commission, a Project Status Report, stating the progress it has made toward completion of the work herein required. Each Project Status Report shall include the Commission Order number, the Order date, the project completion date as noted in the Order, crossing information (crossing inventory number and railroad milepost), type of improvement, and the name, title, mailing address, phone number, facsimile number, and electronic mailing address of the Petitioner's Project Manager.

IT IS FURTHER ORDERED that the Petitioner shall, within five (5) days of the completion of each crossing, submit a completed United States Department of Transportation (US DOT) Inventory Form (#6180.71) to the Federal Railroad Administration (FRA), the Chief of Data Services at the Illinois Department of Transportation (IDOT), and the Director of Processing and Information, Transportation Bureau of the Commission.

IT IS FURTHER ORDERED that the Petitioner is hereby required and directed to submit a Project Status Report to the Director of Processing and Information, Transportation Bureau of the Commission, stating that the work herein required of it has been completed. Said Report shall be submitted within Five (5) days after the project completion date.

IT IS FURTHER ORDERED that the Commission shall retain jurisdiction for the purpose of issuing any Supplemental Order, or Orders, as it may deem necessary.

IT IS FURTHER ORDERED that any Petitioner or person making a Request for Extension of Time up to thirty (30) days to complete a project ordered by the Commission must file a request with the Director of Processing and Information, Transportation Bureau of the Commission, no later than fourteen (14) days in advance of the scheduled deadline. An Administrative Law Judge will consider and decide the request.

IT IS FURTHER ORDERED that any Petitioner or person making a Request for Extension of Time that exceeds thirty (30) days must file a Petition for Supplemental Order requesting the extension of time with the Director of Processing and Information, Transportation Bureau of the Commission no later than twenty-one (21) days in advance of the scheduled deadline. The Commission will decide Petitions for Supplemental Orders.

IT IS FURTHER ORDERED that Petitions for Supplemental Orders, including those requesting extensions of time, must include the reason(s) the additional time is

needed to complete the work, and the time within which the project will be completed. Prior to submitting a Request for Extension of Time, or a Petition for Supplemental Order, the Petitioner must notify the Commission's Rail Safety Program Administrator that it is unable to complete the project within the ordered timeframe.

IT IS FURTHER ORDERED that the Commission or its Administrative Law Judge reserves the right to deny Petitions for Supplemental Orders and Requests for Extension of Time if the reason(s) supporting the request is (are) insufficient, or where it appears the Petitioner or person has not made a good faith effort to complete the project within the allotted time. Failure of the Commission or its Administrative Law Judge to act on a pleading prior to the deadline means the originally ordered completion date remains in effect.

IT IS FURTHER ORDERED that Petitioner CWRC is required and directed to proceed immediately in constructing and equipping said crossings, and shall complete the work within two (2) years from the date of this Order.

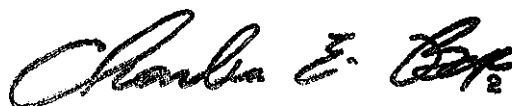
IT IS FURTHER ORDERED that any future changes at the crossings by CWRC shall be made in accordance with 92 Ill. Admin. Code Part 1535, and all applicable Commission and Illinois Department of Transportation rules and regulations.

IT IS FURTHER ORDERED that this Order shall be binding upon the Parties hereto, and their successors and assigns.

IT IS FURTHER ORDERED that, subject to Sections 18c-2201 and 18c-2206 of the Illinois Commercial Transportation Law, 625 ILCS 5/18c-2201 and 2206, this is a final decision of the Commission subject to the Administrative Review Law.

By Order of the Commission this 13th day of September, 2006.

JUDGE
SECTION CHIEF
<i>DWS</i>
ORDERS SUPERVISOR



Chairman